

**STATE OF MICHIGAN
IN THE SUPREME COURT**

MICHAEL MARTIN,

Plaintiff-Appellee,

v

MILHAM MEADOWS I LIMITED
PARTNERSHIP and MEDALLION
MANAGEMENT, INC.,

Defendants-Appellants.

Supreme Court No. 154360

Court of Appeals No. 328240

Kalamazoo County Circuit Court
No.: 13-000485-NO

**PLAINTIFF-APPELLEE MICHAEL MARTIN'S SUPPLEMENTAL
BRIEF IN RESPONSE TO DEFENDANTS-APPELLANTS'
APPLICATION FOR LEAVE TO APPEAL SUBMITTED
PURSUANT TO MCR 7.305(H)(1)**

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STATEMENT OF QUESTION PRESENTED

I. WHETHER GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY DISPOSITION ON PLAINTIFF'S CLAIM THAT THE STAIRS AT ISSUE WERE NOT "FIT FOR THE USE INTENDED BY THE PARTIES" AND THAT THE DEFENDANTS DID NOT KEEP THESE STAIRS IN "REASONABLE REPAIR" PURSUANT TO MCLA 554.139(1)(a) AND (b).

PLAINTIFF-APPELLEE STATES: YES.

DEFENDANTS-APPELLANTS STATE: NO.

TRIAL COURT STATES: NO.

COURT OF APPEALS STATES: YES.

STATEMENT OF FACTS¹

Plaintiff-appellee Michael Martin (“Martin”) was a tenant of Milham Meadows Apartments, located in Kalamazoo, Michigan. The unit Martin rented had a basement accessible by an **indoor** stairway. Martin was injured on October 14, 2010², and had been a tenant at Milham Meadows Apartments since July 13, 2007. Importantly, this is *not* a case involving an outdoor area and does not involve snow/ice.

The evidence and arguments demonstrate that the Court of Appeals’ decision should be affirmed, especially when taking into account the following factors:

- 1) The stairs were improperly designed and constructed by having excessively tall risers and short treads that did not allow sufficient space for a tenant, such as Martin, to safely step;
- 2) Plaintiff, his family, his friends, and his neighbor, all slipped on the stairs (or similar stairs) on multiple occasions due to the defective construction, conditions, and dimensions of the stairs.
- 3) The stairs lacked any type of slip resistance on the treads, either in the paint utilized or in the form of a nose guard;
- 4) Defendants spoliated the stairs by altering and concealing their appearance so that an inspection of the condition of the stairs as they existed at the time of Martin’s fall was unavailable to plaintiff;

¹ This section of plaintiff-appellee’s supplemental brief is offered not to be a mere restatement of his application response papers, but to highlight the necessary relevant facts, which must be viewed in a light most favorable to Michael Martin as the non-moving party, in order for this Court to address and consider the issues presented in its Order of May 19, 2017. These facts are taken from the record evidence submitted in the trial court and the Court of Appeals, as well as from portions of the Court of Appeals’ opinion issued July 19, 2016 (“Slip Op”).

² The discrepancy in Martin’s date of injury is that he fell on October 14, 2010, but was not discovered until help arrived the following day.

- 5) The evidence submitted by plaintiff, which is to be taken most favorable to him, demonstrates that the stairs were not fit for the use intended;
- 6) The stairs were not maintained in reasonable repair as the defect was never addressed or cured by defendants; and
- 7) Defendants had actual and constructive notice of the defective stairs as they not only created the defect in the first place, but the defect was also brought to their attention in writing and verbally by Martin.

Plaintiff's expert Glon's opinions concerning the dangerous condition of the stairs addressed more than just the improper paint utilized by defendants. He also noted that the stairs were improperly constructed and did not provide a sufficient face upon which an adult foot could safely step. Specifically, Mr. Glon offered the following "accident-encouraging" factors that made the subject stairs dangerous to use:

1. The top riser of the basement staircase in the rental townhouse is taller than those of safe staircases;
2. The top tread of the basement staircase in the rental townhouse is shorter than those of safe staircases;
3. The nosing of the top tread of the basement staircase in the rental townhouse is excessively rounded and chipped, causing an already short tread to perform as an even shorter tread than those of safe staircases;
4. The uniform color of the steps of the staircase makes it hard to distinguish individual treads when looking from the top . . . tread nosings or at least the leading edges of treads should be marked in some way to make them clearly visible to users;
5. The paint used on the staircase of the rental townhouse is normal paint that does not contain any "slip-resistant" additive;
6. The riser heights between steps is inconsistent and irregular;

7. The handrail in the staircase is lower than the building code required minimum; and

8. The headroom clearance at the bottom of the steps is less than required for safe staircases.

As the Court of Appeals noted:

Glon also opined that the stairwell's design was dangerous. The stairwell was too steep and each step too narrow for an adult foot. The stairs were of varying heights and the handrail too low to be of assistance. These conditions created a substantial fall risk and violated building codes that had been in place since 1973, Glon opined. (Emphasis added.)

To summarize, the relevant facts demonstrated that the stairs were of such a poor design that they were unsafe and were painted with an improper paint that did not include any type of slip-resistant material, making the stairs' already-unsafe design and construction more dangerous. In addition, as a result of the dangerous combination of conditions, Martin, his family, friends and neighbors had slipped as well on those stairs (or identical stairs in another apartment) on prior occasions, which caused Martin to lodge not only verbal but also written requests to defendant that the defective condition be repaired. It was also undisputed in the lower court that defendants repainted the stairs subsequent to Martin's fall, but prior to him and his counsel being afforded an opportunity to inspect the stairs--thus raising the issue of defendant's spoliation of evidence.

The Court of Appeals correctly noted that there were numerous issues of disputed material facts precluding summary disposition on the issue of whether the stairs were fit for their intended use, or maintained in reasonable repair. The Court of Appeals also correctly noted that it was irrelevant that Martin had successfully navigated the stairs

prior to the actual incident forming the basis of his complaint. Such negative evidence is inappropriate when considering a motion for summary disposition brought pursuant to MCR 2.116(C)(10). Given these contested material facts, summary disposition is completely inappropriate and this Court should endorse and adopt Martin's position as expressed by the Court of Appeals.

ARGUMENT

A. THE COURT OF APPEALS CORRECTLY DETERMINED THAT GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY DISPOSITION ON PLAINTIFF’S CLAIM THAT THE STAIRS AT ISSUE WERE NOT “FIT FOR THE USE INTENDED BY THE PARTIES” AND THAT THE DEFENDANTS DID NOT KEEP THE STAIRS IN “REASONABLE REPAIR” AS REQUIRED BY MCLA 554.139(1)(a) AND (b).

1. Standard of Review.

This Honorable Court most recently considered the Standard of Review applicable to a motion for summary disposition brought pursuant to MCR 2.116(C)(10) in its opinion dated December 13, 2016, in *Lowrey v LMPS & LMPJ, Inc.*, 500 Mich; 890 NW2d 344 (2016). In its analysis in *Lowrey*, this Court noted that pursuant to MCR 2.116(G)(4), a motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact, and that an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing that there is a genuine issue for trial. *Id.*, 500 Mich at 6 - 7. In addition, and for the purpose of the case *sub judice*, this Court is reminded that “when considering the motion, a Court must view the submitted evidence in a light most favorable to the party opposing the motion,” in this instance--Martin. *Corley v Detroit Board of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

2. Negative evidence relied upon by defendants cannot be used to satisfy their burden under MCR 2.116(C)(10), and defendants’ spoliation of evidence should create an adverse inference to be construed in favor of Martin as the non-moving party.

a. Defendants Cannot Rely on Negative Evidence to Satisfy their Burden under MCR. 2.116(C)(10).

Negative evidence has been relied upon heavily by defendants in this matter in an attempt to demonstrate that the stairs were both fit for their intended use and kept in reasonable repair. Specifically, defendants argue that given the length of time Martin had resided in that particular apartment, and the number of times he went up and down the stairs prior to October 15, 2010, the fact that he did not suffer severe injuries prior to then demonstrates that the stairs were fit for their intended use and in reasonable repair. This argument obviously ignores the actual facts of this case, which show Martin and others did slip on the stairs on multiple occasions and reported several of the instances to the defendants prior to this accident, including in writing. Further, it relies on negative evidence which is insufficient to satisfy one's burden for moving for summary disposition under MCR 2.116(C)(10).

Specifically, courts have found that "negative evidence" is not admissible because it is not probative on the issue of defendant's negligence. In *Larned v VanderLinde*, 165 Mich 464; 131 NW 165 (1911), the Supreme Court of Michigan, in a unanimous opinion, ruled that evidence of the absence of accidents was not admissible to show that a party was not negligent. A later case, *McAuliff v Gabriel*, 34 Mich App 344; 191 NW2d 128 (1971), further buttressed this holding by stating:

Admittedly, the policy of this state, as expressed in a considerable body of case law, has evolved limitations on the reception of so-called "negative evidence." Testimony showing the absence of prior accidents is not competent evidence on the issue of defendant's alleged lack of negligence.

Id., at 349. See also, *Grubaugh v St. John's*, 82 Mich App 282, 288; 266 NW2d 791 (1978) ("Evidence of absence of accidents usually involves generally unreliable negative evidence, and does not tend directly to prove absence of negligence. No reports of

accidents . . . could mean no more than no such accidents had been reported or that such accidents had previously been avoided through blind luck.”) Thus, defendants cannot utilize negative evidence to satisfy their burden when bringing a dispositive motion pursuant to subrule (C)(10). (*See also Lowrey v LMPS & LMPJ, Inc.*, 500 Mich; 890 NW2d 344 (2016).

Even if Defendants’ use of negative evidence is considered, it is only one argument to be made in an attempt to show the stairs were “fit”, which is countered by Plaintiff’s clear, ***affirmative*** evidence, that the stairs were “unfit” due to he and several others slipping on the steps numerous times previously, as well as the testimony of Plaintiff’s expert. If this Court decides that the number of times Plaintiff and others slipped on the stairs prior to Plaintiff’s injury is insufficient to establish a material question of fact regarding their fitness then it will, effectively, be establishing a legal threshold of prior incidents that is required before an area passes from the realm of “fit” to “unfit.” For example, in the future, if a tenant slips fifteen times on a set of stairs, would that make them unfit? Or does a tenant have to slip 50 times before the landlord must take any action? This is a determination best left to the finder of fact.

b. Martin is Entitled to an Adverse Inference Regarding the Surface of the Stairs due to Defendants’ Spoliation of Evidence.

While the measurements and configuration of the stairs remained unchanged, one of the elements that caused plaintiff to fall was the surface of the step at the time of the incident. As such, Plaintiff was entitled to test the surface of the stairs and inspect them in their original condition. It is undisputed that defendant repainted the staircase in Martin’s apartment subsequent to his tragedy, but prior to plaintiff being afforded an opportunity to inspect the stairs in the condition they were at the time of Martin’s fall.

It is without question that defendant altered and concealed the condition of the stairs subsequent to the accident. Thus, for the purpose of considering a motion for summary disposition, this Court should consider that adverse inference against defendant when determining whether material issues of fact are present. This is the classic instance of “spoliation” of evidence, which Black’s Law Dictionary, 10th Edition, defines as “the intentional destruction, mutilation, alteration, or concealment of evidence....” (Emphasis added.)

When a party destroys or loses material evidence, whether intentionally or unintentionally, and the other party is prejudiced, a Court has the inherent authority to sanction the culpable party to preserve the fairness and integrity of the judicial system. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). Whether sanctions are necessary to ensure a fair playing field is a function of how important the lost evidence is to the party’s claims or defenses. *Ellsworth v Hotel Corp*, 236 Mich App 185, 193; 600 NW2d 129 (1999). One way to remedy the unfair advantage is to instruct the jury that it may draw an adverse inference³ against the culpable party. M.Civ.J.I. 6.01; *Clark v KMart Corp* (on remand), 249 Mich App 141, 146; 640 NW2d 892 (2002). Because M.Civ.J.I. 6.01 is phrased in a permissive manner, the jury is not required to draw an adverse inference but “is free to decide for itself.” *Id.*, 249 Mich App at 147, quoting *Lagalo v Allied Corp* (on remand), 233 Mich App 514, 521; 592 NW2d 786 (1999).

Such an issue is one of first impression in Michigan but has been observed and commented on by this Court on prior occasion. In *Banks v ExxonMobil Corp*, 477 Mich 983; 725 NW2d 455 (2007), Justice Kelly, in her concurring opinion, indicated that an

³ “Adverse inference” is a detrimental conclusion drawn by the fact finder from a party’s failure to produce evidence within the party’s control. Black’s Law Dictionary, 10th Edition.

adverse inference, if warranted, should be taken into account when a Court rules on a motion for summary disposition. Specifically, Justice Kelly stated:

This Court has stated that whether a summary disposition motion should be granted depends on whether there is evidence “sufficient to permit a reasonable jury to find” for the non-moving party. We have decided that a jury is able to take an adverse inference into account. I believe that it logically follows that the judge must draw the adverse inference when ruling on a motion for summary disposition. Just as the jury should consider all the evidence before it, so too should the judge when ruling on a motion for summary disposition. Otherwise, the judge would not be viewing the evidence, as required, in the light most favorable to the non-moving party.

Id., 477 Mich at 984 - 985.

In considering defendant’s Application, this Court should adopt Justice Kelly’s concurring opinion from *Banks, supra*, and hold that a trial judge should take adverse inferences into consideration when ruling on a motion for summary disposition. Applied to the case *sub judice*, defendant’s spoliation of evidence should create an adverse inference that the stairs were not “fit” for their intended use, nor were they in “reasonable repair.”

3. Application of the entirety of MCLA 554.139 to the evidence in this case demonstrates that there are triable issues of fact as to whether defendants violated MCLA 554.139(1)(a) and (b).

MCLA 554.139(1) titled *Lease or License of Residential Premises: Covenants; Modifications; Liberal Construction; Inspection*, provides, in relevant part:

(1) In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the time of the lease or license **and to**

comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located . . .

(3) The provisions of this section shall be liberally construed
...

(Emphasis added.)

In order for this Court to properly assess whether genuine issues of material fact preclude summary disposition under MCR 2.116(C)(10) for alleged violations of subsection (1)(a) and/or (b), it must first take into account and acknowledge the language in subsection (3), which indicates that the provisions of the entire statute shall be “liberally construed.” “What is called a liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction.” 3 Sutherland, Statutory Construction, §60.01, p. 29; *Birznies v Cooper*, 405 Mich 319, 331-332 fn 12; 275 NW2d 221 (1979); *Tenney v Springer*, 121 Mich App 47, 53 fn 1; 328 NW2d 566 (1982). Given the statutory language, this Court must take into account the liberal construction and inclusive language the statute employs.

a. There are Genuine Issues of Material Fact as to Whether the Stairs were “Fit for the Use Intended by the Parties.”

It is the “panoply of inadequacies in the aggregate, coupled with the necessary use of the stairs . . .” that creates a danger for tenants that must be remedied by the landlord. *O'Donnell v Garasic*, 259 Mich App 569, 570; 676 NW2d 213 (2003). In *Allison v AEW Capital Management, LLP*, 481 Mich 419; 751 NW2d 8 (2008), this Court defined “fit” as “adapted or suited; appropriate[.]” 481 Mich at 429, citing

Random House Webster's College Dictionary, 1997. The statute does not require the lessor to maintain the area at issue in an ideal condition, but that it must be maintained in a condition that renders it fit for use as it is intended. *Id.* at 430.

In interpreting MCLA 554.139(1)(a), in *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124; 782 NW2d 800 (2010), the Court of Appeals found that genuine issues of material fact precluded summary disposition when a tenant fell on a snow-covered exterior staircase. Importantly, the design and configuration of the staircase in *Hadden, supra*, was not at issue; and the only alleged issue that made them “unfit” for the use intended was the presence of snow and ice. *Id.* 287 Mich App at 130.

Previously, in *O'Donnell*, 259 Mich App 569, the Court of Appeals decided a case similar to this one. In *O'Donnell*, the plaintiff-appellant was injured when she fell down the stairs at the owner's cabin when she tried to traverse them in the dark. Although the Court did not address the statutory violations because they had not been raised in the lower court, it found there were numerous violations that the Court found made the stairs unsafe and likely to cause severe harm. Accordingly, because the stairs were likely to cause severe harm, a logical conclusion would be that they also were unfit for the use intended by the parties. Notably, it was not slipperiness that created the potential for severe harm in *O'Donnell*, but a *combination* of factors that created a risk of tenants *losing their balance* while descending the stairs. In this respect, it is, ultimately, the loss of balance, no matter how it occurs, that creates a risk for tenants. Slipperiness is just one of the factors that can cause an individual to lose their balance while descending stairs.

In this case, the steps in Martin's unit had numerous defects that created the hazardous conditions making it likely that he would fall. These factors, combined,

create a material question of fact as to whether the stairs were unfit for their primary purpose of safely providing access between levels in his apartment. This includes not only the absence of slip-resistant paint, or a metal or rubber nose guard for the steps, but also that the steps were extremely chipped and had rounded edges, and were of a design and configuration that did not provide an adequate surface for an adult foot, such as Martin's, to utilize.

Martin, through his expert Glon and witness testimony, provided ample evidence that the condition and configuration of the stairs were dangerous and did not provide "reasonable access" to different levels in the apartment. While defendants disagreed through the presentation of their own expert report, this does nothing but further buttress the opinion of the Court of Appeals that there was a triable issue of material fact regarding whether the stairs were fit for their intended use. As such, summary disposition in favor of defendants would be inappropriate as Martin presented evidence sufficient to establish an essential element of his claim, which was only refuted by defendants' presentation of its own expert witness report and negative evidence. Those disputed facts, taken in conjunction with this Court's decision in *Lowrey, supra*, demonstrates there are triable issues of material fact as to whether the stairs were "fit for the use intended by the parties."

b. There are Genuine Issues of Material Fact as to Whether Defendants Violated MCLA 554.139(1)(b) in Failing to Keep the Premises in "Reasonable Repair" and for Failing to Comply with Health and Safety Laws.

In *Allison, supra*, this Court did not address the requirement under MCL 554.139(1)(b) that requires lessors to comply with the applicable health and safety laws of the state and local government. Such analysis is relevant in this case because, as Mr.

Glon has opined, Defendants clearly failed to comply with the Michigan Residential Codes by failing to create stairs that abide by the dimensions specified. Their failure to comply with health and safety laws is a violation of their duty under this statute.

Defendants also violated MCL 554.139(1)(b) by failing to keep the premises in reasonable repair. In *Allison, supra*, it was noted that the lessor's duties under subsection (1)(b) apply only to the premises, and not common areas. *Id.*, at 432. This Court then stated that the plain meaning of "reasonable repair" as used in subsection (1)(b) requires repair of a defect in the premises. *Id.*, at 433-434, citing *Teufel v Watkins*, 267 Mich App 425, 429 n 1; 705 NW2d 164 (2005). "Defect" is defined as "a fault or shortcoming; imperfection." *Id.*, 481 Mich at 434, citing Random House Webster's College Dictionary (1997). Black's Law Dictionary, 10th Edition further defines "defect" to mean an "imperfection or shortcoming, especially in a part that is essential to the operation or safety of a product." (Emphasis added) Thus, a landlord must repair a defect, which equates to keeping the premises in good condition as a result of restoring and mending damage to the property. *Allison, supra* at 434.

These principles, applied to the case at bar, demonstrate that there are a myriad of issues of material fact precluding summary disposition as to whether the premises had been kept in "reasonable repair." The condition of the stairs at the time Martin fell demonstrate that there was a "defect" present. The improper design concerning the size of the steps, coupled with the inadequate paint and lack of slip resistance, demonstrate that the stairs were imperfect--especially in an area that was essential to their use! In other words, the steps were not only slippery, but also too short to accommodate a foot.

Factual distinctions between the instant case and those in *Allison, Hadden*, and any other holdings involving snow and ice, is extremely significant. The defendant

created the hazard, i.e., the defective conditions in the stairs, that caused Martin to fall. And, each of the defects in the stairs could have been easily remedied by the defendant. In contrast, a hazardous condition resulting from snow and/or ice has no correlation to the defendant's failure to take the proper precautions to construct and/or repair, as necessary, an inside staircase that does not change in condition, due to the weather.

Defendants failed to submit affirmative evidence that negates an essential element of Martin's claim. In addition, Martin demonstrated to the Court more than sufficient evidence to establish essential elements of his claim that the steps were not fit for the use intended by the parties, nor were they kept in reasonable repair despite defendants' knowledge of the defective condition. As such, pursuant to *Lowrey, supra*, defendants are not entitled to summary disposition.

Accordingly, the Court of Appeals' Opinion should be affirmed, and this case should be remanded to the trial court. Any ruling by this Honorable Court to the contrary would completely obliterate MCLA 554.139 and violate the statute's liberal construction as required therein.

RELIEF REQUESTED

WHEREFORE, plaintiff-appellee Michael Martin respectfully requests this Honorable Court affirm the decision of the Court of Appeals and remand this matter to the Kalamazoo County Circuit Court. Plaintiff-appellee also requests the recovery of all costs and attorney fees so wrongfully sustained in pursuing this matter in the Michigan Supreme Court.

Dated: June 30, 2017

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